

COMMENT

RETHINKING THE PROCESS OF POLITICAL REFORM IN HONG KONG



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In a historic vote on 18 June 2015, the Hong Kong government failed to obtain the support of two-thirds of all 70 Legislative Council (LegCo) members for its proposal on universal suffrage of the chief executive.¹ Had the proposal been passed, the chief executive would have been elected by up to five million eligible voters in 2017. Ironically, all 27 pan-democrat legislators voted against the proposal, as was expected for many months. They objected to the restrictions imposed by the Standing Committee of the National People's Congress (NPCSC) in its 31 August 2014 decision.² In their view, the restrictions were incompatible with genuine universal suffrage because they effectively enabled the central government to choose two to three chief executive candidates. In an unexpected blunder, only eight pro-establishment legislators remained in the chamber to vote in favour of the proposal; the other 31 left at the last minute hoping to trigger a delay to buy time for a fellow legislator (Mr Lau Wong-fat), who was stuck in traffic, to arrive and cast his vote. Unfortunately, the plan was not communicated well to those who remained in the chamber. Four days after the reform vote, pan-democratic legislator, Mr Ronny Tong, announced his resignation from both the Civic Party and LegCo in order to start a middle of the road think tank known as "Path of Democracy".³

A process of reform, which began in December 2013, ended in great disappointment for everyone. With the reform proposal rejected, the chief executive will continue to be nominated and selected by a 1200-person

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¹ "Hong Kong reform package rejected as pro-Beijing camp walk out in 'miscommunication'" *South China Morning Post* (18 June 2015).

² Decision of the Standing Committee of the National People's Congress on "Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region" in the Year 2016, adopted 10th Session, 12th National People's Congress, 31 August 2014.

³ Jeffie Lam and Gary Cheung, "Tong's resignation widens pan-dem rift" *South China Morning Post* (23 June 2015).



election committee, at least until 2022, and the earliest possible year for realising full universal suffrage of the legislature will be 2024, if not 2028.⁴ Many reasons have been given for why the reform efforts failed, eg the lack of mutual trust between the pan-democrat legislators and the central government, the hard-line approach adopted by the central and Hong Kong governments allowing for no compromise or negotiations, the 79-day Occupy Central protests and perceived interference by foreign governments strengthening Beijing's resolve to adopt a conservative approach to protect national interests, the uncompromising principled position of the pan-democrat legislators, the central government's indifference to Hong Kong universal suffrage despite outward appearances to the contrary and so on.

Little attention, however, has been paid to how the process of reform may have contributed to the demise of the reform enterprise itself.⁵ No public consultation on the process preceded the public consultation on substantive reform proposals in late 2013. Indeed, surprisingly few questioned the process adopted by the government. It is argued here that the nature and significance of the reform exercise deserved a more participatory process than the one adopted, ie one that involved more meaningful contributions from the public at important moments in the process.⁶ The quality of a participatory process should not be measured solely by the numbers of meetings held with or submissions received from members of the public. Receiving meaningful contributions at important moments means that the public is consulted not only initially on reform issues but also on draft reform proposals before they are finalised. It also means that the relevant reform bodies should include membership from independent individuals, whether as experts or representatives of the public. The Hong Kong government should also have consulted and secured agreement with legislators on the process of reform before commencing the reform exercise. If the stakeholders agreed at the outset that the process to be followed would be fair and

⁴ A chief executive elected by universal suffrage in 2022 may not have enough time to consult the public, reach a consensus on LegCo universal suffrage and pass implementing legislation before the September 2024 LegCo election.

⁵ For one of the few critiques, see Cliff Buddle, "Block of Hong Kong political reform plan only a temporary setback on road to universal suffrage" *South China Morning Post* (19 June 2015).

⁶ On the importance of participatory processes for constitutional change, see Michele Brandt, Jill Cottrell, Yash Ghai and Anthony Regan, "Constitution-making and Reform: Options for the Process" (New York: Interpeace, 2011) pp 13–33; Yash Ghai, "The Constitution Reform Process: Comparative Perspectives", unpublished paper for conference "Toward Inclusive and Participatory Constitution Making", Kathmandu, Nepal, August 2004; Maria Dakolias, "Are We There Yet?: Measuring Success of Constitutional Reform" (2006) 39 *Vanderbilt Journal of Transnational Law* 1117, 1210–1215; Yash Ghai, "Civil Society, Participation and the Making of Kenya's Constitution", unpublished paper on file with the author, 2014.

transparent, it would be more likely that they would accept the outcome from that process.⁷

Two reasons may explain why the 2013–2015 reform process went unquestioned. First, it was more or less the same process followed by the Hong Kong government the two previous times when political reform was attempted, respectively 2004–2005 and 2007–2010.⁸ But those exercises were concerned with only incremental political reform, not the ultimate aim of universal suffrage. Given the significance of a universal suffrage reform exercise, one of great interest to everyone in the special administrative region and likely to attract a wide range of opinions, there were good grounds to modify the existing process to include more meaningful opportunities for public input.

The second reason is the belief that the NPCSC's 2004 interpretation, setting down a five-step procedure for political reform, does not allow for any other process than the one followed in the past.⁹ But the five-step procedure only refers to the sequence of necessary decisions to be made by the relevant three parties: the chief executive, legislators and NPCSC. It neither prescribes nor precludes the adoption of participatory processes and bodies to inform the decision-making at the different steps. Indeed the Hong Kong government's three-person task force conducted consultations before the first step of the chief executive's report and before the vote by legislators at the third step.¹⁰ But the question remains whether more should have been done to receive meaningful input from the public.

In this critical assessment of the 2013–2015 process, one starts by reflecting on the roles played by the Hong Kong government's task force, the NPCSC, the chief executive and the LegCo in the context of constitutional change under the Basic Law. The task force was intended to serve as a kind of constitutional commission that develops initial reform proposals, consults the public on those proposals, and refines those proposals in the light of the consultation results.¹¹ According to the amendment formula in Annex I of the Basic Law, there is no single representative constituent assembly that considers and decides on the

⁷ Interpeace, *ibid.*, p 19.

⁸ LegCo Secretariat, "Constitutional Development", updated background brief for the special meeting of the Panel on Constitutional Affairs, 9 December 2013, LC Paper No CB(2)451/13-14(02).

⁹ The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 8th Session, 10th National People's Congress, 6 April 2004.

¹⁰ See generally "P/R and Other News", available at www.2017.gov.hk.

¹¹ On the distinct roles of constitutional commissions and constituent assemblies, see Interpeace (n 6 above), pp 28–29; Yash Ghai (n 6 above), pp 4–7.

constitutional commission's reform proposals. The role is bifurcated between the NPCSC and the LegCo. The chief executive has a unique role. His views and efforts are reflected in the work of the task force, though he is not formally a member. In addition, as a result of this bifurcation, the chief executive's consent in the amendment process and his dual accountability under Art 43 of the Basic Law, he must serve an important bridging role to bring the deliberations of the NPCSC and the LegCo into closer alignment.

Given the important role played by the task force, it is unsatisfactory that its membership included only three senior officials and no independent members. Independent experts could have enriched the knowledge base of the task force on matters including the conduct of public consultations, the analysis of and reporting on consultation results, the design of nomination methods, the design of a representative nominating committee and universal suffrage election methods.¹² Wide public consultations are no substitute for inclusive and independent membership in the constitutional commission. Independents can contribute expertise and transparency to the process and promote public confidence in the end result.¹³ This has been the experience with having overseas non-permanent judges sitting in the Court of Final Appeal, a court now of international repute, whose judgments are cited throughout the common law world.¹⁴

The task force published a separate consultation document before and after the NPCSC's 31 August decision and conducted public consultations, respectively, from 4 December 2013 to 3 May 2014 (five months) and from 7 January 2015 to 6 March 2015 (two months).¹⁵ The two documents sought views on a wide range of technical questions of design without expressing any preferred view. Two anomalies become apparent when these two documents are read in the context of the reform process. Given the substantial overlap in the lists of questions on which views were sought, it is unclear why the public was asked to express their views twice on the same design issues. Those who submitted a full submission in the first round would fail to see the point of a second submission, unless perhaps to modify one's initial

¹² Interpeace, *ibid.*, pp 17–18; Yash Ghai, *ibid.*, pp 3, 5.

¹³ Yash Ghai, *ibid.*, p 9.

¹⁴ Simon NM Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge: Cambridge University Press, 2014) chs 11, 22.

¹⁵ "Let's Talk and Achieve Universal Suffrage: Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016 Consultation Document" (Hong Kong: HKSAR Government, December 2013); "2017 Seize the Opportunity: Method for Selecting the Chief Executive by Universal Suffrage Consultation Document" (Hong Kong: HKSAR Government, January 2015).

view if it happened to be inconsistent with the NPCSC's August decision. This leads to the second anomaly, which is the disconnect between the full range of questions asked in the first document and the chief executive's report to the NPCSC. The main purpose of the chief executive's report is to express a view on whether there is a need to amend the annexes of the Basic Law to attain the aim of universal suffrage of the chief executive and to progress the method of forming the legislature.¹⁶ Interestingly, the first consultation document never *directly* asked the public if they believed there was a need to amend the annexes, though the answer might be inferable from responses to the individual design questions. But, for the purposes of preparing the chief executive's report, it was unnecessary to consult on such a wide range of technical design issues, especially if a second consultation was anticipated. Having the premature public debate on design details may well have contributed to the NPCSC's strong reaction to calls for civil nominations. A possible explanation for these anomalies is that when the first consultation began, the government did not fully anticipate how the reform process would unfold and the need for and scope of a second consultation.

One judicial review application makes reference to a further disconnect between the chief executive's report and the NPCSC's August decision.¹⁷ From the two previous reform attempts in 2005 and 2010, it is known that when the NPCSC decides affirmatively that there is a need to amend the annexes, it will also impose conditions that limit the changes to be made. However, it is never known in advance what those conditions (or even category of conditions) might be. The first consultation document did not specifically address what conditions should be imposed by the NPCSC, nor did the chief executive's report recommend any specific conditions. This is another unsatisfactory aspect of the current procedures. It was the restrictive conditions contained in the August decision that surprised many, including those in the pro-establishment camp, and triggered the Occupy Central protests. The process failed to manage expectations and defuse conflict.

It comes back to the value of having meaningful input at important moments. Neither of the two consultations sought views on draft reform proposals. Since the NPCSC's decision had the effect of severely

¹⁶ Report by the Chief Executive of the Hong Kong Special Administrative Region to the Standing Committee of the National People's Congress on whether there is a need to amend the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in 2017 and for forming the Legislative Council of the Hong Kong Special Administrative Region in 2016 (Hong Kong: HKSAR Government, July 2014).

¹⁷ *Leung Lai Kwok Yvonne v Chief Secretary for Administration* (HCAL 31/2015, [2015] HKEC 1034), [28].

narrowing the options for reform, it was necessary to consult the Hong Kong public before the decision was finalised. This did not happen as the chief executive's report was submitted on 15 July 2014 and the NPCSC discussed the report only in the last week of August.¹⁸ LegCo's constitutional affairs panel discussed the chief executive's report, but not a draft NPCSC decision, on 21 July 2014.¹⁹

The NPCSC had a short period of time to consider and debate the draft August decision. However, this body of 150 lawmakers from across China had only one Hong Kong member, Ms Rita Fan.²⁰ There is no formal requirement to consult the Basic Law Committee, which has six Hong Kong members; this is an anomaly since interpretations (Art 158) and amendments (Art 159) of the Basic Law require such consultations and the August decision necessarily involved an interpretation of Art 45.²¹ Forming part of the constituent assembly that makes decisions on the political future of Hong Kong, the NPCSC should have greater Hong Kong representation in its membership and a better means of receiving input from the Hong Kong public on its draft decisions.

Following the second consultation, the Hong Kong government released its consultation report and proposal on 22 April 2015.²² It was presented as a final proposal and, as is now known, without any possibility for compromise or negotiation. At this important moment when consultation was crucial, the process did not allow for it. Indeed in the less than two months leading up to the LegCo vote, it was entirely uncertain whether the pan-democrat legislators would ever enter into negotiations with either or both the Hong Kong and central governments. In the end, negotiations never took place, as both sides

¹⁸ First media reports of an "extremely conservative framework" were from 12 August 2014, see "HK May Get Universal Suffrage in 2027" RTHK (12 August 2014).

¹⁹ LegCo Secretariat, "Minutes of Meeting Held on Monday" (LC Paper No CB(2)62/14-15, Panel on Constitutional Affairs, 21 July 2014).

²⁰ Kiki Liu, "HK Legislator Rita Fan: Hong Kong Executive Chief Must Be Reliable" *All-China Women's Federation* (27 October 2014), available at www.womenofchina.cn; Tommy Cheung, "NPC Standing Committee Starts Meeting on Hong Kong Reforms" *South China Morning Post* (25 August 2014).

²¹ Mr Li Fei's explanation to the draft decision indicates, however, that the views of the Hong Kong deputies to the National People's Congress and Hong Kong members of both the Chinese People's Political Consultative Conference and Basic Law Committee were sought. See Li Fei, "Explanations on the Draft Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016", 10th Session, 12th National People's Congress (27 August 2014) 2.

²² "2017 Make It Happen! Method for Selecting the Chief Executive by Universal Suffrage Consultation Report and Proposals" (Hong Kong: HKSAR Government, April 2015).

were not prepared to make concessions.²³ This contrasts with the events in 2010, when the then chief executive brokered negotiations at the last minute between Democratic Party legislators and the central government in order to realise a small breakthrough in political reform.²⁴ It also contrasts starkly with the process of drafting the Basic Law, which involved a 59-member drafting committee, a 180-member consultative committee, and two draft versions of the text published for public consultation.²⁵ The drafting committee had procedures for structured discussions, negotiations and breaking deadlocks.²⁶ In 2015, there was no mechanism for structured negotiations, nor was the chief executive seen trying to bridge the central government and Hong Kong legislators towards closer alignment.²⁷

All future attempts to realise universal suffrage will learn from the mistakes made in the past. As argued here, process matters and considerable thought needs to be put into designing a more participatory process than the existing one.²⁸ This design process must itself be participatory and addressed at the outset of any reform exercise. Getting buy-in from the relevant stakeholders on the process of reform will help to ensure that the process is followed and increase the likelihood that the outcome will be accepted.

One might ask why the central and Hong Kong governments would agree to relax their control over the process by introducing independent membership and more public consultations. The answer lies in the long-term future of Hong Kong, beyond 2047. The Basic Law has no expiry date. The only reference to the 50-year period is in Art 5: “The socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years”. This provision means only that the capitalist system and way of life may change after 2047, but

²³ Jeffie Lam and Tony Cheung, “Bid for Compromise on Hong Kong Electoral Reform Package Fails, Pan-democrats Warned on ‘loyalty’” *South China Morning Post* (1 June 2015); Gary Cheung, “Beijing Leaves No Room for Hong Kong’s Moderate Voices on Political Reform” *South China Morning Post* (29 June 2015).

²⁴ Gang Wenzu, “CE Lays Out Conditions for Counter-proposal” *China Daily* (19 June 2010); Albert Chen, “An Unexpected Breakthrough in Hong Kong’s Constitutional Reform” (2010) 40 *HKLJ* 259.

²⁵ “The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (For Solicitation of Opinions)” (Hong Kong: Drafting Committee for the Basic Law, April 1988) pp 1–4.

²⁶ On the deadlock-breaking mechanisms, see Interpeace (n 6 above), pp 27–28.

²⁷ The list of government press releases and other news on the political reform website (www.2017.gov.hk/en/news/index.html) makes no mention of any effort made by the chief executive to arrange negotiations between the legislators and the central government after the reform proposal was published on 22 April 2015.

²⁸ Dakolias (n 6 above), pp 1211–1212.

if the central government seeks to do so after 2047, it must be done in accordance with the rule of law. As with political reform, it is a problem of constitutional change, although involving the amendment power in Art 159. It would be most unwise to try to effect unilateral change via Art 159, as such a tactic would likely trigger much more than a 79-day civil disobedience movement. Any change of such significance should come from Hong Kong, and on the terms of Art 159, this will require the consent of two-third of all LegCo members. Hopefully when that time comes, we will have established an effective and orderly participatory process suitable for bringing about constitutional change of such momentous importance.